INDEX

REPLY BRIEF IN SUPPORT OF PETITION

1. Was There Sufficient Evidence to Justify Submission of Case to Jury?..... 1

2. Was There Error in Submitting to the Jury Specifications of Negligence Not Supported by Evidence and Not a Proximate Cause of the Injury?..... 7

3. Was There Error in Instructions to the Jury as to the Employer's Duty in Relation to Furnishing a Safe Place to Work and Safe Tools and Appliances?..... 8

4. Conclusion 12

TABLE OF CASES CITED

Bailey vs. Central Vermont Ry., 319 U. S., 350..... 9

Baltimore & Ohio R. R. Co. vs. Groeger, 266 U. S., 521..... 5

Baltimore & Ohio S. W. R. R. Co. vs. Carroll, 280 U. S., 491... 9

Brady vs. So. Ry. Co., 320 U. S., 476..... 6

Chesapeake & Ohio Ry. Co. vs. DeAtley, 241 U. S., 310..... 10

Coleman vs. Lurey, 199 S. C., 442, 20 S. E. (2d), 65..... 10

Echenrode vs. Pennsylvania R. R. Co., 71 Fed. Supp., 764; 164 Fed. (2d), 996; 93 L. Ed., 64, (Advance Sheet No. 2).... 2

Echenrode vs. Pennsylvania R. R. Co., 164 Fed. (2d), 996.... 12

Missouri Pac. R. R. Co. vs. Aeby, 275 U. S., 426..... 5

(2)*Patton vs. Texas & Pac. Ry. Co.*, 179 U. S., 658..... 9

Reynolds vs. A. C. L. R. R. Co., 93 L. Ed., 475 (Advance Sheet No. 8)..... 10

Tennant vs. Peoria & Pekin Union Ry Co., 321 U. S., 29..... 1

Yazoo & Mississippi Valley R. R. Co. vs. Mullins, 249 U. S., 531 9

The Supreme Court of the United States
OCTOBER TERM, 1949

No. 201

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

vs.

L. C. HASELDEN, *Respondent.*

REPLY BRIEF OF PETITIONER

By way of reply to respondent's brief filed in opposition to the petition for a writ of certiorari herein petitioner begs leave to submit the following.

Point I

Was There Sufficient Evidence of Actionable Negligence to Justify the Submission of the Case to the Jury?

It cannot be fairly contended that this Court has ever departed from the rule that there can be no recovery under the Federal Employers' Liability Act for an injury without proof that it was due to negligence which was a proximate cause, in whole or in part, of the injury.

In the comparatively recent case of *Tennant vs. Peoria & Pekin Union Ry. Co.*, 321 U. S., 29, the Court said:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 87 L. ed. 610, 617, 63 S. Ct. 444, 143 ALR 967. Petitioner was required to present probative facts from which the negligence and the casual relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' "

To the same effect is *Eckenrode vs. Pennsylvania R. R. Co.*, 71 Fed. Supp., 764; 164 Fed (2d), 996; 93 L. Ed., 64 (Advance Sheet No. 2); in which the opinion of the Supreme Court of the United States was filed on November 15, 1948.

Due consideration of the specifications of negligence contained in the complaint (R 6-7), in connection with the testimony and respondent's brief, will demonstrate that in actual substance respondent does not even claim that petitioner failed in the performance of any duty owing to him except in the following respects: (1) failure to furnish a flat car instead of a gondola for the loading of the rails; (2) failure to furnish a sufficient amount of help. Further analyzing these charges, in connection with respondent's own testimony and an express declaration contained in his brief, it will be seen that respondent in reality depends for recovery solely upon the failure to furnish a flat car.

Respondent testified (R 30):

"Q. Now, you say that the men here were pushing until it got out of reach?

A. Yes.

Q. If you had had a flat car as you ordered, would it have been necessary for them to push it that high up?

A. They could have pushed it up without getting it out of reach.

Q. The rail would not have ever been out of reach to the men on the ground?

A. No.

Q. If you had had a flat car as you ordered and did not receive, what would have been the way that it would have been loaded?

A. You could load on the skid but you would have had power to push it up with. Pulling with a small rope, we did not have power to load."

On page 13 of respondent's brief will be found the following express admission:

"Had petitioner furnished respondent with a flat car upon which to load the 935-pound rails, which is normally furnished, the five men with respondent would have been sufficient, as they would not have had to push the rails so high and could all have applied their strength at the same time."

It is true that in the same paragraph of respondent's brief it is said that it must also be kept in mind that respondent was not furnished "with proper ropes, etc.", but this charge as to the ropes was refuted by respondent's own testimony showing that he himself selected the rope and in addition had a chain to go around the rail. As to this he gave the following testimony (R 38-39):

"Q. Now, you spoke a while ago of having a rope tying up one end of the rail as it was being pulled up to the car, where did you get that rope?

A. I bought the rope from Mr. Bradshaw's store.

Q. And did you have a chain too?

A. I had a chain around the rail.

Q. Where did you get the chain?

A. I found it down in the yard.

Q. In the loading of those rails did the rope or chain or either one of them break?

A. No.

Q. Was that a new rope you were using?

A. Yes.

Q. And a strong, heavy chain?

A. Well, it was strong enough to load.

Q. Nothing broke?

A. No."

It is also suggested that having to load the rails across a ditch played some part in the accident, but plainly there can be no substance in this suggestion, because the rail that is said to have caused the injury already had been safely moved across the ditch and had been pulled almost entirely up the side of the gondola car (R 30).

On page 17 of respondent's brief it is further suggested that some part in the accident was played by the alleged fact that the workers had to stand in and near a ditch, but we fail to find any testimony whatever to the effect that any of the workers had to stand in a ditch, and we feel confident that this statement is the result of some misapprehension.

Apparently there can be no room for doubt that the real essence of the breach of duty attributed by respondent to petitioner is furnishing a gondola car instead

of a flat car, and obviously respondent must stand or fall upon proof that petitioner was negligent in so doing and that such negligence contributed to the injury as a proximate cause.

In measuring the extent of petitioner's duty to respondent in relation to the kind of car that ought to have been furnished, it should be kept in mind that the employer is not bound to furnish the latest or best tools or appliances that can be obtained for the use of his servants. As said in *Baltimore & Ohio R. R. Co. vs. Groeger*, 266 U. S., 521:

> "It is a well established rule that the master is not bound to furnish the latest or best tools or appliances for the use of his servants. That rule is applicable here, and we hold that defendant was not liable for failure to furnish the best mechanical contrivances and inventions, or to discard appliances upon discovery of later improvements * * *."

The Court also said in *Missouri Pac. R. R. Co. vs. Aeby*, 275 U. S. 426: "The petitioner was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition."

There is no testimony at all to the effect that a gondola car is not a proper car on which to load rails, nor is there any testimony that gondola cars are not in common use for that purpose, nor is there any testimony that an accident had ever occurred before on account of the use of a gondola car instead of a flat car, nor is there any testimony indicating that petitioner had any reason whatever to anticipate that the use of a gondola car would result in injury to respondent.

That there was no unusual peril in loading rails

on a gondola is conclusively shown by the fact of the ten rails respondent was required to load on the gondola five had already been safely loaded, as will thus appear from his own testimony (R 39):

"Q. How many rails did you load into that car that morning?

A. Five.

Q. And did you load those five rails in the car the same way you were trying to load this sixth rail?

A. Yes.

Q. You did not get hurt in loading those five rails?

A. No.

Q. Did anybody else get hurt?

A. Not that I know of.

Q. You were right there on the job?

A. Yes.

Q. So that you loaded five rails in the car that morning in the same way that you attempted to load the sixth rail?

A. Yes; that is right.

Q. And were the five rails that you loaded in the car that morning the same kind of rails?

A. Yes."

In order to charge petitioner with responsibility for respondent's injury because a gondola car instead of a flat car was furnished not only must it appear that petitioner was negligent in so doing, but it must also appear that the injury was the natural and probable consequence of the negligent act, and that it ought to have been foreseen in the light of the circumstances. Mere possibility is not sufficient.

In *Brady vs. So. Ry. Co.*, 320 U. S., 476, the Court, in quoting from a former case, thus states the rule:

> "But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

The mere fact that if a flat car had been furnished the accident might not have happened is not sufficient to entail liability upon petitioner. As said in the Brady case, "the mere fact that with a sound rail the accident might not have happened is not enough."

After all, it might be appropriately suggested that if respondent is to be held to the allegations of the complaint, the cause of his injury was the selection by him of a bent rail out of a pile of forty rails from which he was directed to load ten rails (R 38), the cause of the injury being thus alleged in the complaint (R 6): "* * * In the process of loading the car with said rails, one rail which was bent caught on the gondola on which they were being loaded, causing the loose end to spring over, striking plaintiff, knocking him down, injuring his leg and crushing his foot."

Point II

Did the State Supreme Court Err in Sustaining the Submission for the Consideration of the Jury of Specifications of Negligence Not Supported by Evidence and Not a Proximate Cause of the Injury?

As to this point we shall not repeat what we have already said in the brief heretofore filed by us, but we

ask the attention of the Court to pages 22-25 of our former brief.

In addition to what we have heretofore said we now only desire to say that whatever view may be taken as to the other specifications of negligence, all of which we think are without supporting evidence, it is difficult to see how it could be contended that there was any testimony whatever justifying the submission of specifications (a) (R 6) and (g) (R 7) to the jury.

Specification (a) is as follows: "In failing to provide plaintiff with a safe place to work in that he was directed to load heavy iron rails across a ditch." The rail from which respondent received his injury, at the time of the injury, had already been moved across the ditch without any trouble at all and was being placed in the car. Having to move the rail across the ditch could not possibly have had anything to do with the injury. Moving the rail across the ditch had already been safely accomplished.

Specification (g) is as follows: "In failing to provide plaintiff with proper supervision and direction with which to work." Respondent's own testimony shows (R 38) that he himself had the entire supervision and direction of the work, and if there was any negligence in that respect it was solely his own.

Point III

Did the Supreme Court of South Carolina Err in Sustaining the Trial Court's Charge to the Jury as to the Employer's Duty in Relation to Furnishing a Safe Place to Work and Safe Tools and Appliances?

If the jury could reasonably have understood from the charge of the presiding judge that petitioner's

duty in relation to furnishing a safe place to work and safe tools and appliances was absolute then it cannot be doubted that prejudicial error was committed, and that petitioner is entitled to a new trial. *Yazoo & Mississippi Valley R. R. Co. vs. Mullins*, 249 U. S., 531; *Baltimore & Ohio S. W. R. R. Co. vs. Carroll*, 280 U. S., 491.

Respondent contends that the charge of the presiding judge finds support from the case of *Patton vs. Texas & Pac. Ry Co.*, 179 U. S., 658, in which the duty of the master to furnish a safe place to work was referred to as positive. We think it quite obvious, however, that the word "positive" was used in that case in the sense of nondelegable, as pointed out on page 27 of the brief heretofore filed by us, and we ask the attention of the Court to what we have there said.

Respondent also contends that the charge of which complaint is made finds support in the case of *Bailey vs. Central Vermont Ry.*, 319 U. S., 350, it being claimed by respondent's counsel that the construction which they have placed upon *Patton vs. Texas & Pac. Ry. Co.*, supra, is expressly affirmed and adopted in that case. We do not so read the Bailey case although we have read it very carefully. We have been unable to find anything in the case to that effect. On the contrary we think that the Bailey case supports the position of the petition rather than that of respondent. While the Patton case is cited as to a matter entirely different from the question here involved.

Respondent seeks to avoid the consequence of the error committed by the trial judge by advancing the contention that a duty was imposed upon petitioner to request a clarification of the instructions to the jury. Matters of procedure such as this, of course, are regulated by the law of the forum, even though

the right sought to be enforced is one under the Federal Employers' Liability Act. In *Chesapeake & Ohio Ry Co. vs. DeAtley*, 241 U. S., 310, an action under the Federal Employers' Liability Act, the Court said: "Although the present action was based upon a Federal statute, it was triable and tried in a state court; hence local rules of practice and procedure were applicable." An illustration of the application of this rule will be found in the quite recent case of *Reynolds vs. Atlantic Coast Line R. R. Co.*, 93 L. Ed., 475, (Advance Sheet No. 8), decided February 14, 1949.

The rule in South Carolina applicable to the question with which we are now concerned is so clearly and forcefully stated in *Coleman vs. Lurey*, 199 S. C., 442, 20 S. E. (2d), 65, that we take the liberty of quoting at length therefrom as follows:

> "It is well established by numerous decisions of this Court that any error on the part of the trial judge in the statement of the issues will be deemed waived if counsel fail to bring it to his attention. Among the many cases so holding we cite the following: Gowns v. Watts Mill, 135 S. C., 163, 133 S. E., 550; Hiller v. Bank of Columbia, 96 S. C., 74, 79 S. E., 899; Park v. Laurens Cotton Mills, 75 S. C., 560, 56 S. E., 234. There was, however, no error here in the statement of the issues.
>
> "We have likewise repeatedly sanctioned the sound principle that while the constitution requires that Judges 'shall declare the law' (Art. V, Sec. 26), this simply means that the Judge shall state the controlling principles of law applicable to the case in the light of the pleadings and the evidence, even if no request is presented by counsel for either party; but that if any elab-

oration thereof, or by a charge on some specific phase, is desired, counsel must bring the matter to the attention of the Court or it will be deemed to have been waived. An excellent statement of this rule, supported by many South Carolina cases cited in the footnote, is the following from 64 C. J., 838-841: 'It is a rule of very general application that, if instructions given are correct as far as they go, but are deficient merely because of their generality or failure to reach all points in the case, a party desiring additional instructions to be given must make a request therefor. As was said in an early decision in which Justice Story wrote the opinion, *it is sufficient that the Court has given no erroneous directions.* "If either party deems any point presented by the evidence to be omitted in the charge, such party may require an opinion from the Court upon that point; if he does not, it is a waiver of it." ' Emphasis added.)

"Moreover, this rule is especially applicable where, as in the case at bar, the trial Judge inquired at the conclusion of his charge to the jury as to whether counsel desired any additional or more specific instructions. See the recent case of Williams v. Southeastern Life Insurance Company, 197 S. C., 171, 14 S. E. (2d), 895, and the cases therein cited. But it is manifest that this rule does not apply if the Court has given 'erroneous directions.' To hold otherwise would impose upon counsel the rather delicate and difficult task of presenting exceptions to the charge before the retirement of the jury, a practice which we have not adopted, although it does prevail in some other Courts and jurisdictions. We think that the law was clearly and correctly expressed in the

opinion of this Court delivered by Mr. Justice Carter in the case of Steinberg v. South Carolina Power Co., 165 S. C., 367, 163 S. E., 881, 883, as follows: 'While it is the duty of counsel to follow the Judge's charge and at the conclusion of the charge to call to the Judge's attention any misstatement of issues, in order that the Court, jury, and opposing counsel may not be misled, and to request a fuller charge on any phase of the law, if in the opinion of counsel a fuller charge is necessary to enable the jury to render a correct verdict and do justice between the litigants, it is not incumbent upon counsel, in order to protect the rights of his client, to call the Judge's attention to what counsel considers an erroneous statement of the law applicable to the case. To make such requirement might place counsel in an embarassing position.' "

CONCLUSION

Regardless of whether the social results accomplished be good or bad, the law still requires proof of negligence in order to recover for an injury under the Federal Employers' Liability Act, and even though the social results seem unfair, if respondent has failed to show negligence resulting in injury to him as a proximate cause, he cannot fairly be permitted to recover. The situation is so well expressed by the Circuit Court of Appeals of the Third Circuit in *Echenrode vs. Pennsylvania R. R. Co.*, 164 Fed. (2d), 996, (affirmed by the Supreme Court of the United States, November 15, 1948) that we do not believe we can better close this brief than by quoting the following from the opinion of the Court in that case:

"Any Federal Judge who sees these railroad

accident cases come in and go out of the courts must be troubled by the unsatisfactory social results obtained. Some claimants go out with very large verdicts. Others go out with nothing. Yet in each case the injury has come as part of the business of train movement and the disastrous consequences upon the victim or his family are equally heavy. But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist. It does not exist in this case."

Respectfully submitted.

CHARLES COOK HOWELL,
Wilmington, N. C.
V. E. PHELPS,
Wilmington, N. C.
Attorneys for Petitioner.

T. D. PAULLING,
Darlington, S. C.
JOHN F. WILMETH,
Hartsville, S. C.
A. F. WOODS,
Marion, S. C.
M. C. WOODS, JR.,
Marion, S. C.
Of Counsel.